

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)

4)
5 MUR 6544)

6 MSNBC, Inc.)

CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY
SYSTEM
7)
8
9

10 **GENERAL COUNSEL'S REPORT**

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12 Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring
13 criteria as a basis to allocate its resources and decide which matters to pursue. These criteria
14 include without limitation an assessment of the following factors: (1) the gravity of the alleged
15 violation, taking into account both the type of activity and the amount in violation; (2) the
16 apparent impact the alleged violation may have had on the electoral process; (3) the complexity
17 of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal
18 Election Campaign Act of 1971, as amended ("the Act"), and developments of the law. It is the
19 Commission's policy that pursuing relatively low-rated matters on the Enforcement docket
20 warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances
21 or, where the response sufficiently rebuts the allegations set forth in the complaint, to make no
22 reason to believe findings.

23 The Office of General Counsel has scored MUR 6544 as a low-rated matter and has
24 determined that it should not be referred to the Alternative Dispute Resolution Office. For the
25 reasons set forth below, the Office of General Counsel recommends that the Commission find no
26 reason to believe that MSNBC, Inc. violated the Act or Commission regulations.

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1 In this matter, complainant David H. Zisser asserts that MSNBC, Inc., by broadcasting a
2 program hosted by Ed Schultz and entitled *The Ed Show*, made illegal in-kind corporate
3 contributions to the re-election campaign of President Obama. Specifically, Mr. Zisser states
4 that *The Ed Show*, which he characterizes as a “news commentary program, devoted 14 minutes
5 and 48 seconds of uninterrupted cable time to President Obama’s fundraising speech in Atlanta,
6 Georgia which was identified as ‘Breaking News.’” Complaint at 1-2. In addition, according to
7 the complaint, “no further than 80 laudatory emails/tweets appeared below the President as he
8 spoke,” whereas no such communications “of a negative nature” appeared. Complaint at 2.

9 Although Mr. Zisser concedes that the President’s speech was of “modest news note”
10 [sic],² he asserts that it was not the equivalent of a “White House Rose Garden Press Conference
11 or an Oval Office speech to the nation on a subject of national importance” and, therefore, “was
12 not worthy of an uninterrupted fifteen minutes of free cable time.” *Id.* As such, Mr. Zisser
13 maintains that the MSNBC program at issue was merely a “thinly-disguised and illegal [in-kind]
14 campaign contribution,” the cost of which, he observes, can only be imagined, but that clearly
15 ran afoul of 2 U.S.C. §§ 441b(a) and 441b(b)(2).³

16 MSNBC and NBCUniversal Media, LLC, which owns MSNBC, filed a joint response to
17 the complaint, stating that “the broadcast in question did not violate the Act because it falls
18 squarely within the “press exemption to Section 441b.” Response at 1. The response goes on to

² Mr. Zisser does not describe the topics on which the President spoke.

³ In his complaint, Mr. Zisser states that “MSNBC has very strict in-house ethical rules governing political campaign contributions by members of its own journalism team,” and mentions Keith Olbermann and Joe Scarborough as two journalists who, Mr. Zisser alleges, ran afoul of MSNBC’s ethical guidelines. However, MSNBC suspended Mr. Scarborough and Mr. Olbermann for two days each, after the two journalists were found to have made contributions of \$4,000 (Scarborough) and \$7,000 (Olbermann) to political candidates. See <http://mediadecoder.blogs.nytimes.com/2010/11/19/joe-scarborough-suspended-for-two-days-for-political-donations/>. It does not appear that the Scarborough/Olbermann incidents, which involved direct political contributions, are relevant here.

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1 state that the “Act specifically exempts from the definition of ‘expenditure’” any news story,
2 commentary, or editorial distributed through the facilities of any broadcasting station...unless it
3 is owned or controlled by any political party, committee or candidate,” which MSNBC is not, as
4 it is owned by NBCUniversal, a global media company that is also not owned by any candidate,
5 party or committee. Response at 2. Further, the response quotes *Citizens United v. the Federal*
6 *Election Commission*, 130 S.Ct. 876, 905 (2010), for the proposition that “media corporations are
7 now exempt from § 441b’s ban on corporate expenditures.” Response at 1. Accordingly, the
8 respondents state that Mr. Zisser’s complaint lacks merit, and urge that the Commission
9 summarily dismiss it.

10 As neither the Act nor the Commission’s regulations use or define the term “media
11 exemption,” the Commission has historically conducted a two-step analysis to determine whether
12 the media exemption applies. First, the Commission asks whether the entity engaging in the
13 activity is a media entity, and focuses on whether the entity in question produces, on a regular
14 basis, a program that disseminates news stories, editorials, and/or commentary. See Advisory
15 Opinions 2010-8 (*Citizens United*); 2005-16 (*Fired Up!*); and 1996-16 (*Bloomberg*).

16 Second, in determining the scope of the exemption, the Commission considers two
17 factors: (1) whether the press entity is owned or controlled by a political party, political
18 committee, or candidate; and, if not, (2) whether the media entity is acting as a media entity in
19 conducting the activity at issue (i.e., whether the entity is acting in its “legitimate press
20 function”). See *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).
21 With respect to the second factor, when determining whether an entity is engaging in a legitimate
22 media function, the Commission examines 1) whether the entity’s materials are available to the

1 general public; and 2) whether they are comparable in form to those ordinarily issued by the
2 entity. *Id*; *see also* Advisory Opinion 2010-8 (Citizens United).

3 In previous matters, the Commission has recognized that an entity otherwise eligible for
4 the media exemption “would not lose its eligibility merely because of a lack of objectivity in a
5 news story, commentary, or editorial, even if the news story, commentary, or editorial expressly
6 advocates the election or defeat of a clearly identified candidate for Federal office.” Advisory
7 Opinion 2005-16 (Fired Up!); *see also* MUR 5928 (Kos Media, LLC) and MUR 6242
8 (J.D. Hayworth).

9 Here, MSNBC fits squarely within the “press exemption.” First, MSNBC is a cable
10 television network that delivers news and commentary 24 hours a day. Response at 1. Second,
11 neither it nor NBCUniversal, which owns MSNBC, are owned by any political candidate,
12 committee or party. The fact that MSNBC’s program, *The Ed Show*, may have been favorable to
13 Mr. Obama’s candidacy does not remove it from the confines of the press exemption. *See*
14 Advisory Opinion 2010-08 (Statement of Commissioner Steven T. Walther) (the press
15 exemption “assures the unfettered right of the newspaper, TV networks, and other media to cover
16 and comment on political campaigns...the Commission has applied the press exemption broadly
17 to news stories, commentaries, and editorial ‘no matter in what medium they are published...’”).
18 Accordingly, based upon the complaint and response in this matter, the Office of General
19 Counsel recommends that the Commission find that there is no reason to believe that MSNBC,
20 Inc. violated 2 U.S.C. §§ 441b(a) and 441b(b)(2).

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RECOMMENDATIONS

1. Find no reason to believe that MSNBC, Inc. violated 2 U.S.C. §§ 441b(a) and (b)(2).
2. Close the file and send the appropriate letters.

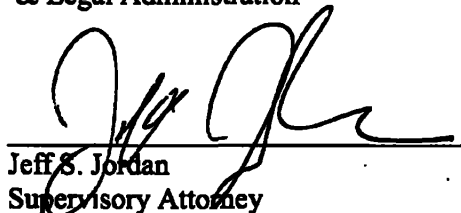
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Attachment:
Factual and Legal Analysis for MSNBC, Inc.

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